Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1393

THOMAS E. SINGLETON,
Petitioner,

vs.

GEORGE J. L. WULFF, JR., M.D.
and
MICHAEL FREIMAN, M.D.,
Respondents.

ON WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit

Petition for Certiorari Filed May 6, 1975
Certiorari Granted June 23, 1975

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To the United States Court of Appeals for the Eighth Circuit

Petition for Certiorari Filed May 6, 1975
Certiorari Granted June 23, 1975

CHRONOLOGICAL LIST OF RELEVANT DISTRICT COURT DOCKET ENTRIES

Nov. 2, 1973—Complaint, with prayer for three-judge court, filed and summons issued.

Nov. 8, 1973—Designation, by Pat Mehaffy, Chief Judge of 8th Circuit United States Court of Appeals, of District Judge James H. Meredith, Circuit Judge William H. Webster, and Senior Judge Roy W. Harper to constitute three-judge court to hear and determine this action filed. Copy to Judges and attorney of record.

Nov. 14, 1973—Defendant State Board of Registration for the Healing Arts granted to Dec. 17, 1973, to file responsive pleading.

Nov. 16, 1973—Marshal's returns on service of summons/complaint filed (executed Nov. 7, 1973).

Nov. 26, 1973—Entry of appearance of John C. Danforth, Attorney General, State of Missouri, and Kermit W. Almstedt, Assistant Attorney General, State of Missouri, as attorneys for defendant Thomas E. Singleton, Chief, of Bureau of Medical Service, Division of Welfare, filed.

Motion of defendant, Thomas E. Singleton, Chief of Bureau of Medical Services, Division of Welfare, to extend time to file his answer to the complaint, and suggestion in support of said motion, filed.

Dec. 3, 1973—Order filed granting defendant Thomas E. Singleton, Chief of Bureau of Medical Service, Division of Welfare, through Dec. 17, 1973, in which to answer or otherwise plead to plantiffs' complaint. Carbon copy attorneys.

Dec. 14, 1973—Plaintiffs' interrogatories directed to defendant, Thomas E. Singleton, Chief of Bureau of Medi-

cal Services, Division of Welfare, State Department of Public Health and Welfare, filed.

Plaintiffs' interrogatories directed to defendant, The State Board of Registration for the Healing Arts, filed.

Dec. 14, 1973—Defendant State Board of Registration for the Healing Arts' motion to dismiss Counts I and III, and suggestions in support thereof, filed.

Dec. 17, 1973—Defendant, Thomas E. Singleton's motion to dismiss Count II of complaint, and suggestions in support thereof, filed.

Dec. 28, 1973—Plaintiffs' request for leave to court to file on or before Jan. 14, 1974 suggestions in opposition to each of defendants' respective motions to dismiss, said motions to be taken as submitted upon filing of plaintiffs' said suggestions or upon Jan. 14, 1974, whichever first occurs, filed, presented and granted.

Jan. 10, 1974—Defendant State Board of Registration for the Healing Arts' answers to interrogatories filed.

Jan. 11, 1974—Plaintiffs granted until Feb. 4, 1974, within which to respond to and submit memoranda of law in opposition to defendants' motions to dismiss.

Jan. 16, 1974—Defendant Thomas E. Singleton's answers to plaintiffs' interrogatories filed.

Defendant Thomas E. Singleton's objection to plaintiffs' interrogatory No. 4 filed.

Feb. 1, 1974—Plaintiffs granted to Feb. 18, 1974, in which to file responses to the respective motions to dismiss of defendants.

Feb. 19, 1974—Plaintiffs' memorandum in opposition to the motion to dismiss by defendant Thomas E. Singleton,

Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare, filed.

May 31, 1974—Memorandum Opinion of Judges Webster, Meredith and Harper filed and Clerk directed to prepare and enter the proper order dismissing the case. Carbon copy to attorneys.

May 31, 1974—Order and Judgment filed. Cause dismissed. Carbon copy to attorneys.

June 17, 1974—Plaintiffs' Motion for Leave of Court to Add Parties Plaintiff(s) and Memorandum of Authorities in Support of Plaintiffs' Motion for Leave of Court to Add Parties Plaintiff(s) filed.

June 24, 1974—Defendant Singleton's Suggestions in Opposition to Plaintiffs' Motion for Leave of Court to Add Parties Plaintiff(s), filed.

June 24, 1974—Memorandum and Order, filed (Roy W. Harper, Judge), denying plantiffs' motion pursuant to Rule 21, Federal Rules of Civil Procedure, to add parties plaintiff(s) in Count II and denying plaintiff's request that Court grant time to seek out plaintiffs whose litigative posture would satisfy requirement of standing, etc. Copy of Memorandum and Order sent attorneys of Record.

June 24, 1974—Plaintiff's motion of June 17 and entire file submitted to Judge Harper.

June 28, 1974—Notice of Appeal of Plaintiffs George J. I. Wulff, Jr., M.D. and Michael Freiman, M.D. from an Order and Judgment dismissing Count II filed. Copy sent to defendant's attorneys. Certified copy of Appeal and 2 certified copies of Clerk's docket entries delivered to Clerk of United States Court of Appeals, 8th Circuit. Cash deposit of $250.00 made as bond.

Aug. 5, 1974—Copy of order of United States Court of

Appeals received and filed. That parties may proceed on the designated original record and appendix as required by Local Rule 11. Appendix and opening brief for appellants will be due to be served and filed on or before August 28, 1974.

Aug. 6, 1974—Plaintiff appellants' designation of record and statement of issues filed.

Aug. 13, 1974—Defendant-appellee's designation of record on appeal filed.

Aug. 14, 1974—Original file, paged and indexed, delivered to Clerk of United States Court of Appeals together with two certified copies thereof, and copy of minute entries.

Aug. 20, 1974—Letter from Frank Susman regarding designation of record. Copy delivered to United States Court of Appeals.

Jan. 28, 1975—Order filed refunding $250.00 bond.

Feb. 6, 1975—Order of United States Court of Appeals filed reversing decision of the three-judge panel.

March 31, 1975—Order filed. Portion of R.S.Mo. 208.152 (12) quote "that such family planning services shall not include abortions unless such abortions are medically indicated" is unconstitutional.

CHRONOLOGICAL LIST OF RELEVANT COURT OF APPEALS DOCKET ENTRIES

June 28, 1974—Docketing case.

June 28, 1974—Certified copies notice of appeal and docket entries in United States District Court.

June 28, 1974—Appellant's Motion for Injunction Pending Appeal.

June 28, 1974—Memorandum of Authorities in Support, etc.

July 1, 1974—Appearance for appellants.

July 8, 1974—Motion of appellee to dismiss appeal.

July 8, 1974—Suggestions in support of Motion to dismiss appeal.

July 8, 1974—Suggestions of appellee in Opposition to Motion for Injunction.

July 9, 1974—Original files from District Court (1 Volume Pleadings).

July 9, 1974—Appearance for appellee.

July 12, 1974—Appellant's suggestions in opposition to motion to dismiss.

July 12, 1974—Appellant's motion to dispense with appendix.

July 15, 1974—Appellee's Reply to Appellants Suggestions in Opposition to Appellee's Motion to Dismiss.

July 18, 1974—Order: Appellant's motion for injunction pending appeal denied.

July 18, 1974—Order: Appellee's motion to dismiss denied without prejudice to right of appellee to raise jurisdictional questions in brief and argument.

Aug. 2, 1974—Order: Parties to proceed on designated original record and appendix as required by Rule 11. Appendix and opening brief due Aug. 28.

Aug. 6, 1974—Appellants' Designation of Record and Statement of Issues.

Aug. 15, 1974—Appellees' Designation of record.

Aug. 15, 1974—Original and 2 copies designated record received from Clerk, District Court.

Aug. 28, 1974—Brief appellant with service. Original and 4.

Oct. 1, 1974—Brief appellee with service. Original and 4.

Oct. 15, 1974—Reply brief of appellant with service. Original and 4.

Oct. 22, 1974—Submitted to screening panel.

Nov. 21, 1974—Transferred to December Session.

Dec. 13, 1974—Argued and submitted to Judges Matthes, Ross and Stephenson. (Recorded). Appellant: Frank Susman; Appellee: Michael Boicourt, Assistant Attorney General; Conclusion by Susman.

Dec. 31, 1974—Opinion by Judge Stephenson (printed, published).

Dec. 31, 1974—Judgment of district court reversed; cause remanded to district court for proceedings consistent with this court's opinion.

Jan. 3, 1975—Petition for rehearing (Appellant). Original and 3.

Jan. 9, 1975—Order: Petition for rehearing denied; application for attorney fee denied (printed, published).

Jan. 20, 1975—Appellee's motion for stay of mandate.

Jan. 20, 1975—Appellee's motion for extension of time for issuance of mandate.

Jan. 20, 1975—Appellee's statement of intention to make application to Supreme Court for writ of certiorari.

Jan. 24, 1975—Appellants' opposition to appellees' motion for stay of mandate.

Jan. 31, 1975—Order: Motion for appellee for stay of mandate denied.

Feb. 5, 1975—Mandate issued.

Feb. 7, 1975—Receipt for mandate.

April 1, 1975—Certified transcript prepared for Supreme Court.

May 12, 1975—Notice of filing petition for certiorari in Supreme Court as 74-1393.

July 1, 1975—Certified copy of order of Supreme Court granting certiorari in case number 74-1393.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

GEORGE J. L. WULFF, JR., M.D.,
and
MICHAEL FREIMAN, M.D.,
Plaintiffs,

vs.

THE STATE BOARD OF REGISTRATION FOR THE HEALING ARTS
and
THOMAS E. SINGLETON, CHIEF OF BUREAU OF MEDICAL SERVICES, DIVISION OF WELFARE, STATE DEPARTMENT OF PUBLIC HEALTH AND WELFARE,
Defendants.

Cause No. 730 731(A)

COMPLAINT FOR DECLARATORY JUDGMENTS AND INJUNCTIVE RELIEF
Filed November 2, 1973

COUNT ONE

I Jurisdiction

Come now plaintiffs and for their cause of action in this Count One of their Complaint state:

1. Plaintiffs invoke the jurisdiction of this Court under the First, Fourth, Fifth, Eighth, Ninth and Fourteenth

Amendments to the United States Constitution; under United States Code, Title 28, Chapter 85, Section 1343; under United States Code, Title 28, Chapter 151 (Declaratory Judgments), Sections 2201 and 2202; under United States Code, Title 28, Chapter 155, Sections 2281 and 2284; and under United States Code, Title 42, Chapter 21, Section 1983.

2. The claim herein arises within this federal judicial district and division.

3. This is an action for a declaratory judgment and permanent injunction against the enforcement of or reliance upon by defendant or by any of its officers, members, agents, employees, appointees or their successors of the statutory wording "but excluding abortion" contained in Missouri Revised Statutes, Title 28, Chapter 431, Section 431.061, subsection (1)(1971).

4. Said statute, herein involved, is set out below in full:

"431.061 *Minors, treatment of certain conditions and diseases authorized*

Any physician, surgeon, any institution or facility of the state department of health, a municipal health department, or any public or private hospital may provide examination, treatment, hospitalization, medical and surgical care for any person under the age of twenty-one years, for:

(1) Pregnancy, but excluding abortion;

(2) Venereal disease;

(3) Drug or substance abuse including those referred to in chapter 195, R.S.Mo. 1969."

II Parties

5. Plaintiff, GEORGE J. L. WULFF, JR., M.D., is a duly licensed physician residing and engaged in the practice of obstetrics and gynecology within this judicial district and division. Dr. Wulff is an Associate Professor of Obstetrics and Gynecology at Washington University Medical School and a member of the staff of Barnes Hospital, Washington University Clinics, St. Luke's Hospital, Missouri Baptist Hospital and St. Joseph's Hospital of Kirkwood. He is a member and past president of the St. Louis County Medical Society, a member of the Missouri State Medical Association, a member of the American Medical Association, a member and past president of The Central Association of Obstetricians and Gynecologists, a member and past president of The St. Louis Gynecological Society, a Fellow of The American College of Surgeons and a Fellow of the American College of Obstetricians and Gynecologists. In addition, Dr. Wulff is the author of numerous, published articles in the field of obstetrics and gynecology.

6. Plaintiff, MICHAEL FREIMAN, M.D., is a duly licensed physician residing and engaged in the practice of obstetrics and gynecology within this judicial district and division. Dr. Freiman is an Instructor of Clinical Obstetrics and Gynecology at Washington University Medical School and a member of the staff of Barnes Hospital and Jewish Hospital of St. Louis. He holds certification in and is a Fellow of the American Board of Obstetricians and Gynecologists and is a member of the American Medical Association, the Missouri State Medical Association and the St. Louis City Medical Society.

7. Plaintiffs bring this cause of action on their own behalf and on behalf of the entire class consisting of duly licensed physicians and surgeons presently performing or desiring to perform abortions upon unmarried minors within the State of Missouri. Said class of physicians and surgeons is so numerous that joinder of all members is impractical. There exist substantial questions of law and fact common

to the class and the claims of plaintiffs are typical of the claims of the class. Plaintiffs will fairly and adequately represent the interests of the class.

8. Defendant, THE STATE BOARD OF REGISTRATION FOR THE HEALING ARTS, is an administrative board created by Missouri state statutes and charged with the licensing of physicians and surgeons, including plaintiffs, and may place on probation, revoke or suspend said license for unprofessional and dishonorable conduct, including the performance of an abortion upon a minor without parental consent, as presently prohibited by the stautory wording, herein challenged.

III Causes of Action

9. The wording "but excluding abortion", herein challenged, contained in subsection (1) of said involved statute, on its face:

(a) Is unconstitutionally vague and uncertain and is in violation of the specificity requirements of the Fourteenth Amendment to the United States Constitution;

(b) Deprives plaintiffs and their respective patients of the right to privacy within the physician-patient relationship and infringes upon said right, the same being protected and guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution;

(c) Deprives plaintiffs of their right to practice medicine according to the highest standards of medical practice and infringes upon said right, the same being protected and guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution;

(d) Deprives plaintiffs' patients of the fundamental right of a woman to determine for herself whether to bear children and infringes upon said right, the same being protected and guaranteed by the Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution;

(e) Infringes upon plaintiffs' right to render and their patients' right to receive safe and adequate medical advice and treatment pertaining to the decision of whether to carry a pregnancy to term, the same being protected and guaranteed by the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution;

(f) Deprives plaintiffs and their patients, each in their own classification, of the equal protection of the laws by treating similarly situated classes differently and discriminatorily with no compelling justification for said classification;

(g) By their enforcement, implementation and application and by their threatened enforcement, implementation and application places plaintiffs in the position of decision making beset with such inherent possibilities of bias and conflict of interest, and exposes plaintiffs to the threat of grave civil liability and loss of property, liberty and occupation, as to deprive plaintiffs and their patients of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution; and

(h) Directly and purposely infringes upon the right of a pregnant woman's attending physician, during the stage prior to the end of the first trimester, to make the abortion decision and render its effectuation free from state interference, contrary to guarantees of due process protected and guaranteed by the Fourteenth Amendment to the United States Constitution.

IV Relief Prayed

WHEREOF, plaintiffs pray in this Count One of their Complaint that this Court:

10. Convene a statutory court of three (3) Judges, pursuant to United States Code, Title 28, Section 2281, to hear and to determine the rights and prayers of plaintiffs, promptly and without delay.

11. Issue a declaratory judgment holding that the wording "but excluding abortion" contained in Missouri Revised Statutes, Title 28, Chapter 431, Section 431.061, subsection (1) (1971) is in violation of the constitutional rights of plaintiffs and their patients, as protected and guaranteed by the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution and that the same is severable from the remaining parts of said statute.

12. Issue a permanent injunction restraining defendant, its officers, members, agents, employees, appointees or their successors from enforcing, implementing, applying or relying upon said statutory wording, herein challenged, in derogation of the rights of plaintiffs and their patients, issue such other and further orders and relief as to the Court may seem meet and proper, award to plaintiffs a reasonable attorneys' fee, and tax all costs herein to defendant.

COUNT TWO

Come now plaintiffs and for their cause of action in this Count Two of their Complaint state:

I Jurisdiction

13. Plaintiffs by reference adopt paragraphs 1 and 2 of Count One above and the same are made a part hereof.

14. This is an action for a declaratory judgment and permanent injunction against the enforcement of, reliance upon, the present application of and interpretations thereunder of the statutory wording "shall not include abortions unless such abortions are medically indicated" contained

in Missouri Revised Statutes, Title 12, Chapter 208, Section 208.152, subsection (12) (1973) by defendant or by any of his agents, employees, appointees or their successors.

15. The pertinent portions of said statute herein involved are set out below in full:

> "Section 208.152. Benefit payments for medical assistance may be made on behalf of those eligible needy persons who are unable to provide for it in whole or in part, with any payments to be made on the basis of the reasonable cost of the care or reasonable charge for the services as defined and determined by the division of welfare unless otherwise hereinafter provided, for the following:
>
> (1) . . .
>
> . . .
>
> (12) Family Planning Services as defined by Federal rules and regulations provided, however, that such Family Planning Services shall not include abortions unless such abortions are medically indicated."

II Parties

16. Plaintiffs by reference adopt paragraphs 5 and 6 of Count One above and the same are made a part hereof.

17. Plaintiffs bring this cause of action on their own behalf and on behalf of the entire class consisting of duly licensed physicians and surgeons presently performing or desiring to perform abortions upon women, minors and adults, eligible for Missouri State Medicaid assistance and payments except as restricted or prohibited by the statutory wording, herein challenged. Said class of physicians and surgeons is so numerous that joinder of all members is impractical. There exist substantial questions of law and fact common to the class and the claims of plaintiffs are

typical of the claims of the class. Plaintiffs will fairly and adequately represent the interests of the class.

18. Defendant, THOMAS E. SINGLETON, is Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare, for the State of Missouri and in said capacity directs, supervises, authorizes and controls the applications, approvals, denials and payments of claims for payment and reimbursement of medical and surgical costs and expenses arising from or related to the procedure of abortion for women eligible for Missouri State Medicaid assistance.

III Causes of Action

19. The wording "shall not include abortions unless such abortions are medically indicated", herein challenged, contained in subsection (12) of said involved statute, on its face and as applied, enforced and implemented:

(a)-(h). Plaintiffs adopt by reference subparagraphs (a) through (h) of paragraph 9 of Count One above and the same are made a part hereof.

IV Relief Prayed

WHEREFORE, plaintiffs pray in this Count Two of their Complaint that this Court:

20. Convene a statutory court of three (3) Judges, pursuant to United States Code, Title 28, Section 2281, to hear and to determine the rights and prayers of plantiffs, promptly and without delay.

21. Issue a declaratory judgment holding that the wording "shall not include abortions unless such abortions are medically indicated" contained in Missouri Revised Statutes, Title 12, Chapter 208, Section 208.152, subsection (12) (1973) is in violation of the constitutional rights of plaintiffs and their patients, as protected and guaranteed by

the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution and holding that women, minors and adults, eligible for Missouri State Medicaid assistance and payments, shall be eligible for such assistance and payments for the medical and surgical procedure of abortion, without restriction or qualification.

22. Issue a permanent injunction restraining defendant, his agents, employees, appointees or their successors from enforcing, implementing, replying upon and applying said statutory wording, herein challenged, in derogation of the rights of plaintiffs and their patients, issue such other and further orders and relief as to the Court may seem meet and proper, award to plaintiffs a reasonable attorneys' fee and tax all costs herein to defendant.

COUNT THREE

Come now plantiffs and for their cause of action in this Count Three of their Complaint state:

I Jurisdiction

23. Plaintiffs by reference adopt paragraphs 1 and 2 of Count One above and the same are made a part hereof.

24. This is an action for a declaratory judgment and permanent injunction against the enforcement of or reliance upon by defendant or by any of its officers, members, agents, employees, appointees or their successors of the statutory wording "pregnancy" contained in Missouri Revised Statutes, Title 28, Chapter 431, Section 431.061, subsection (1) (1971), as the same may be interpreted or applied to exclude the giving, prescribing or providing of any form of contraception or contraceptive device.

25. Said statute, herein involved, is set out below in full:

"431.061 *Minors, treatment of certain conditions and diseases authorized*

Any physician, surgeon, any institution or facility of the state department of health, a municipal health department, or any public or private hospital may provide examination, treatment, hospitalization, medical and surgical care for any person under the age of twenty-one years, for:

(1) Pregnancy, but excluding abortion;

(2) Venereal disease;

(3) Drug or substance abuse including those referred to in chapter 195, RSMo 1969."

II Parties

26. Plaintiffs by reference adopt paragraphs 5 and 6 of Count One above and the same are made a part hereof.

27. Plaintiffs bring this cause of action on their own behalf and on behalf of the entire class consisting of duly licensed physicians and surgeons presently giving, prescribing or providing or desiring to give, prescribe or provide any form of contraception or contraceptive device for unmarried minors within the State of Missouri. Said class of physicians and surgeons is so numerous that joinder of all members is impractical. There exist substantial questions of law and fact common to the class and the claims of plaintiffs are typical of the claims of the class. Plaintiffs will fairly and adequately represent the interests of the class.

28. Defendant, THE STATE BOARD OF REGISTRATION FOR THE HEALING ARTS, is an administrative board created by Missouri state statutes and charged with the licensing of physicians and surgeons, including plaintiffs, and may place on probation, revoke or suspend said

license for unprofessional conduct, including the giving, prescribing or providing contraception or any contraceptive device to a minor without parental consent, as may be prohibited by the statutory wording, herein challenged, or otherwise.

29. The wording "pregnancy", herein challenged, contained in subsction (1) of said involved statute on its face is vague and ambiguous and, if interpreted, construed and applied to exclude the giving, prescribing and providing of contraception or any contraceptive device:

(a)-(h). Plaintiffs adopt by reference subparagraphs (a) through (h) of paragraph 9 of Count One above and the same are made a part hereof.

IV Relief Prayed

WHEREFORE, plaintiffs pray in this Count Three of their Complaint that this Court:

30. Convene a statutory court of three (3) Judges, pursuant to United States Code, Title 28, Section 2281, to hear and to determine the rights and prayers of plaintiffs, promptly and without delay.

31. Issue a declaratory judgment holding that the wording "pregnancy" contained in Missouri Revised Statutes, Title 28, Chapter 431, Section 431.061, subsection (1) (1971), if interpreted, construed or applied to exclude the giving, prescribing or providing of any form of contraception or contraceptive device, is in violation of the constitutional rights of plaintiffs and their patients, as protected and guaranteed by the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution.

32. Issue a permanent injunction restraining defendant, its officers, members, agents, employees, appointees or their successors from enforcing, implementing, applying or rely-

ing upon said statutory wording herein challenged, in derogation of the rights of plaintiffs and their patients, issue such other and further orders and relief as to the Court may seem meet and proper, award to plaintiffs a reasonable attorneys' fee and tax all costs herein to defendant.

FRANK SUSMAN
SUSMAN WILLER & RIMMEL
705 Olive Street—Suite 1212
St. Louis, Missouri 63101
(314) 621-2030

Attorneys for Plaintiffs

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

(Title Omitted in Printing)

ENTRY OF APPEARANCE

November 26, 1973

Come now John C. Danforth, Attorney General, State of Missouri, and Kermit W. Almstedt, Assistant Attorney General, State of Missouri, and make their entry of appearance as attorneys for defendant Thomas E. Singleton, Chief of Bureau of Medical Service, Division of Welfare, in the above-entitled cause of action.

Respectfully submitted,

JOHN C. DANFORTH
Attorney General

KERMIT W. ALMSTEDT
Assistant Attorney General

Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321

Attorneys for Defendant

(Certificate of Service Omitted in Printing)

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

(Title Omitted in Printing)

PLAINTIFF'S INTERROGATORIES DIRECTED TO DEFENDANT, THOMAS E. SINGLETON, CHIEF OF BUREAU OF MEDICAL SERVICES, DIVISION OF WELFARE, STATE DEPARTMENT OF PUBLIC HEALTH AND WELFARE

December 14, 1973

Come now plaintiff and, pursuant to Rule 33 of The Federal Rules of Civil Procedure, propound the following interrogatories to defendant, THOMAS E. SINGLETON, CHIEF OF BUREAU OF MEDICAL SERVICES, DIVISION OF WELFARE, STATE DEPARTMENT OF PUBLIC HEALTH AND WELFARE:

1. State the number, dates, amounts paid and information justifying that the same were "medically indicated" for all abortions for which said defendant or others under his supervision made or authorized payments for medical assistance under Mo.R.S., Section 208.152 since January 1, 1972.

2. State in detail the present interpretation applied by defendant or others under his supervision to the term "abortions medically indicated"; what medical criteria is included and excluded under said definition; and, what medical symptoms, diagnosis, indications or justifications

would qualify an abortion to be "medically indicated" under Mo.R.S., 208.152, as codified and as applied by defendant or others under his supervision.

3. State each and every medical or surgical procedure for which payments are authorized and made under Mo.R.S. 208.152 and the amounts authorized or made for each of the same.

4. State for each and every medical or surgical procedure listed in response to interrogatory no. 3, the total sums paid for each type of procedure since January 22, 1973 to date.

FRANK SUSMAN
SUSMAN WILLER & RIMMEL
705 Olive Street—Suite 1212
St. Louis, Missouri 63101
(314) 621-2030

Attorneys for Plaintiffs

(Certificate of Service Omitted in Printing)

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

(Title Omitted in Printing)

MOTION TO DISMISS

December 17, 1973

Comes now defendant, Thomas E. Singleton, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare, by his attorney of record, John C. Danforth, Attorney General, State of Missouri, and specifically by Kermit W. Almstedt, Assistant Attorney General, State of Missouri, pursuant to Rule 12, Federal Rules of Civil Procedure, and moves this Court to dismiss Count II of plaintiff-doctors' complaint as against him for the following reasons:

(1) That the declaratory relief prayed for does not present to this Court a case or controversy ripe for judicial determination.

(2) That the plaintiff-doctors do not possess the requisite standing to litigate the constitutional issues raised.

(3) That the injunctive relief requested cannot be granted since the plaintiff-doctors are not susceptible to irreparable harm through any possible manner of enforcement of the statutory section under litigation; and furthermore, the administrative remedies established under the state welfare laws have not been exhausted.

(4) That the complaint fails to state a cause of action since the plaintiff-doctors personally could suffer no harm cognizable under Title 42 U.S.C. §1983 with jurisdiction under Title 28 U.S.C. §1343; and furthermore, plaintiff-doctors cannot litigate the alleged deprivation or infringement of the civil rights of their welfare patients.

WHEREFORE, defendant Singleton, prays that Count II of plaintiff-doctors complaint be dismissed as against him without the necessity of convening a three judge-district court, at plaintiff-doctors' cost and for such other and further relief as this Court deems proper in the premises.

Respectfully submitted,

JOHN C. DANFORTH
Attorney General

KERMIT W. ALMSTEDT
Assistant Attorney General

Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321

Attorneys for Defendant

(Certificate of Service Omitted in Printing)

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

(Title Omitted in Printing)

DEFENDANT THOMAS E. SINGLETON'S ANSWERS TO PLAINTIFFS' PROPOUNDED INTERROGATORIES

Interrogatory No. One

State the number, dates, amounts paid and information justifying that the same were "medically indicated" for all abortions for which said defendant or others under his supervision made or authorized payments for medical assistance under Mo.R.S., Section 208.152 since January 1, 1972.

Answer to Interrogatory No. One

1. The Revised Statutes of Missouri, under Section 208.152, have not permitted authorization for medical assistance payments within the state of Missouri for abortion operations prior to the effective date, September 28, 1973, when such statutory section was amended by Senate Bill No. 302. Senate Bill No. 302 authorized medical assistance payments for medically indicated abortions. For the months of September (after the 28th), October, November and December, 1973 no such payments were made.

Interrogatory No. Two

State in detail the present interpretation applied by defendant or others under his supervision to the term "abor-

tions medically indicated"; what medical criteria is included and excluded under said definition; and, what medical symptoms, diagnosis, indications or justifications would qualify an abortion to be "medically indicated" under Mo.R.S., 208.152, as codified and as applied by defendant or others under his supervision.

Answer to Interrogatory No. Two

2. No definition or interpretation has been established for the phrase "abortions medically indicated" and no determination has been made as to what medical symptoms, diagnoses, indications or justifications would qualify an abortion to be "medically indicated".

Interrogatory No. Three

State each and every medical or surgical procedure for which payments are authorized and made under Mo.R.S. 208.152 and the amounts authorized or made for each of the same.

Answer to Interrogatory No. Three

3. The answer to Interrogatory No. 3 may be derived or ascertained from the business records, or examination thereof, of the Division of Welfare, specifically, the Procedure Code Listing which lists approximately 12,000 medical or surgical procedures for which payments are authorized under Section 208.152 of the Revised Statutes of Missouri and which listing has the fee schedule allowed for each such medical or surgical procedure. The plaintiffs are afforded a reasonable opportunity to examine such records and to make copies or summaries thereof. Such listing is under the control of defendant Thomas E. Singleton. Defendant Singleton states that the burden of deriving or ascertaining the answer to Interrogatory No. 3 from the Procedure Code Listing is substantially the same for the party serving the interrogatory as for the party served.

Interrogatory No. Four

State for each and every medical or surgical procedure listed in response to interrogatory no. 3, the total sums paid for each type of procedure since January 22, 1973 to date.

Answer to Interrogatory No. Four

4. Defendant's attorney has objected to Interrogatory No. 4.

STATE OF MISSOURI }
COUNTY OF COLE } ss

I, Thomas E. Singleton, Chief of Bureau of Medical Services, Division of Welfare, upon my oath state the above facts and information are true to the best of my knowledge and belief.

THOMAS E. SINGLETON
Chief of Bureau of Medical Services
Division of Welfare

(Jurat Omitted in Printing)

JOHN C. DANFORTH
Attorney General

KERMIT W. ALMSTEDT
Assistant Attorney General

Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321

Attorneys for Defendants

(Certificate of Service Omitted in Printing)

Exhibit A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

(Title Omitted in Printing)

AFFIDAVIT OF PLAINTIFF GEORGE J. L. WULFF, JR., M.D.

February 19, 1974

Comes now plaintiff, GEORGE J. L. WULFF, JR., M.D., and states that he submits this Affidavit in opposition to the Motion to Dismiss heretofore filed by each respective defendant in this cause. Said Affidavit is attached as "Exhibit A" and made a part of the Memoranda of plaintiffs filed in opposition to said Motions to Dismiss. Said plaintiff further states:

1. He is a citizen of the United States and a resident of St. Louis County, Missouri.

2. He is a duly licensed physician within the State of Missouri being the holder of license no. 21306 issued him on July 10, 1933. He is actively engaged in the practice of obstetrics and gynecology within the State of Missouri with his principal office and place of business located at 5505 Delmar, St. Louis, Missouri.

3. He is a diploma recipient from Washington University School of Medicine, and an Associate Professor of Obstetrics and Gynecology at said University. He is a member and past president of the St. Louis County Medical Society, the St. Louis Gynecological Society, and the Cen-

tral Association of Obstetrics and Gynecology. He is also a member of the Missouri State Medical Association, American Medical Association, Fellow of American College of Surgeons and Fellow of American College of Obstetricians and Gynecologists. He is the past Chief of the Obstetrics and Gynecology Department of St. Luke's Hospital, St. Louis, Missouri. He is also a medical staff member of Barnes Hospital, Washington University Clinics, Missouri Baptist Hospital and St. Joseph Hospital, all of said hospitals being within the St. Louis, Missouri area.

4. At his principal office, at the hospitals of which he is a medical staff member, and at other locations, all within the State of Missouri, he provides and renders and anticipates providing and rendering medical services, *including abortion and contraceptive advice,* to numerous patients, many of whom are minors and/or welfare recipients and said medical services are controlled and regulated by the statutes herein challenged.

5. He fears the defendant State Board of Registration for the Healing Arts will discipline him, and he is threatened by the powers of said Board to seek reprisals against him, based upon his past performance of abortions and anticipated future performance of abortions upon unmarried minors, without parental consent, on a non-emergency basis. The present and real threat of discipline, probation, censure and license revocation or suspension by said Board for his performance of abortions upon minors as aforestated deters him from the practice of medicine in the manner he considers to be most expertise and beneficial for his minor patients and in the manner he considers to be in the highest standard of medical practice and said threat chills and thwarts the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and his minor patients.

6. He fears the defendant State Board of Registration for the Healing Arts will discipline him, and he is threatened by the powers of said Board to seek reprisals against him, based upon his treatment of and anticipated treatment of unmarried minors, without parental consent, on a non-emergency basis. The present and real threat of discipline, probation, censure and license revocation or suspension by said Board for his treatment of minors as aforestated deters him from the practice of medicine in the manner he considers to be most expertise and beneficial for his minor patients and in the manner he considers to be in the highest standard of medical practice and said threat chills and thwarts the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and his minor patients.

7. He fears the defendant State Board of Registration for the Healing Arts will discipline him, and he is threatened by the powers of said Board to seek reprisals against him, based upon his past and anticipated dispensing or prescribing of any form of contraception or contraceptive devices to unmarried minors, without parental consent, on a non-emergency basis. The present and real threat of discipline, probation, censure and license revocation or suspension by said Board for his dispensing or prescribing contraceptives to minors as aforestated deters him from the practice of medicine in the manner he considers to be most expertise and beneficial for his minor patients and in the manner he considers to be in the highest standard of medical practice and said threat chills and thwarts the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and his minor patients.

8. He is uncertain of the present interpretation applied by defendant Thomas E. Singleton, Chief of Bureau of Medical Services, Division of Welfare, State Department of Pub-

lic Health and Welfare, or others under said derendant's supervision to the term "abortions medically indicated"; what criteria are included and excluded under said definition; and, what medical symptoms, diagnosis, indications or justifications would qualify an abortion to be "medically indicated" under §208.152 R.S.Mo. 1969, as codified and as applied by said defendant and/or others under his supervision. By virtue of said plaintiff's uncertainty in respect to §208.152 R.S.Mo. 1969, he is deterred from the practice of medicine in the manner he considers to be most expertise and beneficial for his welfare patients eligible for Medicaid payments and in the manner he considers to be in the highest standard of medical practice and said uncertainty chills and thwarts the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and his welfare patients eligible for Medicaid payments.

9. He has provided, and anticipates providing abortions to welfare patients who are eligible for Medicaid payments but he and said patients have been refused, and anticipate future refusals by defendant Singleton and/or those under his supervision to make Medicaid payments for abortions based upon the challenged language in §208.152 R.S.Mo. 1969. Said refusals by said defendant, and anticipated future refusals of a like nature deter this plaintiff from the practice of medicine in the manner he considers to be most expertise and beneficial for said patients and in the manner he considers to be in the highest standard of medical practice and said refusals chill and thwart the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and said patients.

GEORGE J. L. WULFF, JR., M.D.

(Jurat Omitted in Printing)

Exhibit B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

(Title Omitted in Printing)

AFFIDAVIT OF PLAINTIFF MICHAEL FREIMAN, M.D.

February 19, 1974

Comes now plaintiff, MICHAEL FREIMAN, M.D., and states that he submits this Affidavit in opposition to the Motion to Dismiss heretofore filed by each respective defendant in this cause. Said Affidavit is attached as "Exhibit B" and made a part of the Memoranda of plaintiffs filed in opposition to said Motions to Dismiss. Said plaintiff further states:

1. He is a citizen of the United States and a resident of St. Louis County, Missouri.

2. He is a duly licensed physician within the State of Missouri being the holder of license No. 26130 issued him on July 16, 1955. He is actively engaged in the practice of obstetrics and gynecology within the State of Missouri with his principal office and place of business located at 8631 Delmar, St. Louis, Missouri.

3. He is a diploma recipient from Washington University School of Medicine, and an Instructor of Obstetrics and Gynecology at said University. He is a member of the St. Louis City Medical Society, the Missouri State Medical

Association, American Medical Association and Fellow of American College of Obstetricians and Gynecologists. He is a medical staff member of Barnes Hospital and Jewish Hospital, both of said hospitals being within the St. Louis, Missouri area.

4. At his principal office, at the hospitals of which he is a medical staff member, and at other locations, all within the State of Missouri, he provides and renders and anticipates providing and rendering medical services, *including abortion* and *contraceptive advice,* to numerous patients, many of whom are minors and/or welfare recipients and said medical services are controlled and regulated by the statutes herein challenged.

5. He fears the defendant State Board of Registration for the Healing Arts will discipline him, and he is threatened by the powers of said Board to seek reprisals against him, based upon his past performance of abortions and anticipated future performance of abortions upon unmarried minors, without parental consent, on a non-emergency basis. The present and real threat of discipline, probation, censure and license revocation or suspension by said Board for his performance of abortions upon minors as aforestated deters him from the practice of medicine in the manner he considers to be most expertise and beneficial for his minor patients and in the manner he considers to be in the highest standard of medical practice and said threat chills and thwarts the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and his minor patients.

6. He fears the defendant State Board of Registration for the Healing Arts will discipline him, and he is threatened by the powers of said Board to seek reprisals against him, based upon his treatment of and anticipated treatment of unmarried minors, without parental consent, on a non-

emergency basis. The present and real threat of discipline, probation, censure and license revocation or suspension by said Board for his treatment of minors as aforestated deters him from the practice of medicine in the manner he considers to be most expertise and beneficial for his minor patients and in the manner he considers to be in the highest standard of medical practice and said threat chills and thwarts the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and his minor patients.

7. He fears the defendant State Board of Registration for the Healing Arts will discipline him, and he is threatened by the powers of said Board to seek reprisals against him, based upon his past and anticipated dispensing or prescribing of any form of contraception or contraceptive devices to unmarried minors, without parental consent, on a non-emergency basis. The present and real threat of discipline, probation, censure and license revocation or suspension by said Board for his dispensing or prescribing contraceptives to minors as aforestated deters him from the practice of medicine in the manner he considers to be most expertise and beneficial for his minor patients and in the manner he considers to be in the highest standard of medical practice and said threat chills and thwarts the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and his minor patients.

8. He is uncertain of the present interpretation applied by defendant Thomas E. Singleton, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare, or others under said defendant's supervision to the term "abortions medically indicated"; what criteria are included and excluded under said definition; and, what medical symptoms, diagnosis, indications or justifications would qualify an abortion to be "medically

indicated'' under §208.152 R.S.Mo. 1969, as codified and as applied by said defendant and/or others under his supervision. By virtue of said plaintiff's uncertainty in respect to §208.152 R.S.Mo. 1969, he is deterred from the practice of medicine in the manner he considers to be most expertise and beneficial for his welfare patients eligible for Medicaid payments and in the manner he considers to be in the highest standard of medical practice and said uncertainty chills and thwarts the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and his welfare patients eligible for Medicaid payments.

9. He has provided, and anticipates providing abortions to welfare patients who are eligible for Medicaid payments but those who have submitted applications for such payments on his behalf and said patients have been refused, and anticipate future refusals by defendant Singleton and/or those under his supervision to make Medicaid payments for abortions based upon the challenged language in §208.152. R.S.Mo. 1969. Said refusals by said defendant, and anticipated future refusals of a like nature deter this plaintiff from the practice of medicine in the manner he considers to be most expertise and beneficial for said patients and in the manner he considers to be in the highest standard of medical practice and said refusals chill and thwart the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and said patients.

MICHAEL FREIMAN, M.D.

(Jurat Omitted in Printing)

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

(Title Omitted in Printing)

MOTION FOR EXTENSION OF TIME AND SUGGESTIONS IN SUPPORT THEREOF

February 22, 1974

Comes now defendant, Thomas E. Singleton, Chief of Bureau of Medical Services, Division of Welfare, by and through his attorney of record, Kermit W. Almstedt, Assistant Attorney General, State of Missouri, and moves this court to enter an appropriate order extending the time in which defendant Thomas E. Singleton has to file appropriate materials in opposition to the affidavits filed with plaintiffs' Memorandum in Opposition to the Motion to Dismiss by Defendant Singleton in the above captioned case for an additional thirty days from February 25, 1974 through March 27, 1974.

The reasons for such extension of time are the following:

(1) That pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure, when any ''matters outside the pleading are presented to and not excluded by the court, the motion (referring to a motion to dismiss for failure to state a claim upon which relief can be granted) shall be treated as one for summary judgment and disposed of as

provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

(2) That plaintiffs have filed affidavits in connection with their Memorandum in Opposition to defendant Singleton's motion to dismiss and unless this court excludes such affidavits from its consideration, by Rule 12(b) (6), Federal Rules of Civil Procedure, defendant should be granted a reasonable opportunity to present material in opposition to the material presented in the affidavits of plaintiffs. Such an extension may be granted pursuant to this court's Rule VIII(c) (4).

(3) That Assistant Attorney General, Kermit W. Almstedt, contacted by telephone his client on the date of receipt of plaintiffs' Memorandum in Opposition to defendant Singleton's motion to dismiss and was informed that it would take approximately thirty days to compile the necessary data and information in order to contravene any allegations of fact raised in plaintiffs' affidavits.

(4) That the request for extension of thirty days is not made for any dilatory reason and should be an appropriate amount of time for defendant Singleton, through his attorney of record, Kermit W. Almstedt, Assistant Attorney General, State of Missouri, to file all necessary material in opposition to plaintiffs' affidavits filed in support of plaintiffs' Memorandum in Opposition to defendant Singleton's Motion to Dismiss.

WHEREFORE, defendant Singleton, by and through his attorney of record, moves this court to grant additional time to March 27, 1974, in which defendant Singleton has to file his materials in opposition to the affidavits filed

with plaintiffs' Memorandum in Opposition to defendant Singleton's motion to dismiss.

Respectfully submitted,

JOHN C. DANFORTH
Attorney General

KERMIT W. ALMSTEDT
Assistant Attorney General

Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321

Attorneys for Defendant

(Certificate of Service Omitted in Printing)

IN THE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

WULFF, JR., M. D., et al.,
Plaintiffs,

vs.

STATE BOARD OF REGISTRATION FOR THE HEALING ARTS, et al.,
Defendants.

No. 73C 731(A)

MEMORANDUM

May 31, 1974

This matter is before the Court on motion of defendant, State Board of Registration for the Healing Arts (hereinafter referred to as State Board), to dismiss Counts I and II of the plaintiffs' complaint, and on motion of defendant, Thomas E. Singleton, to dismiss Count II of plaintiffs' complaint. Counts I and III name the State Board as defendant and Count II names Thomas E. Singleton as defendant.

Plaintiffs, George J. L. Wulff, Jr. and Michael Freiman, are physicians licensed by the State of Missouri, engaging in the practice of obstetrics and gynecology. Defendant, State Board, is an administrative board created by Missouri state statutes charged with the licensing of physicians. The State Board has the power to revoke or suspend a physician's license for unprofessional and dishonorable conduct under R. S. Mo. 334.100. Defendant, Thomas E. Singleton, is the Chief of the Bureau of Medical Services, Division of Welfare, State Department of Public

the highest standards of medical practice, deprives plaintiffs' patients of the fundamental right of a woman to determine for herself whether to bear children, infringes upon plaintiffs' right to render and their patients' right to receive safe and adequate medical advice and treatment, deprives plaintiffs and their patients of the equal protection of the law and due process of law, and constitutes state interference with the abortion decision, all of which is in violation of the United States Constitution.

The contentions relied upon by the defendant State Board to sustain its motion to dismiss Counts I and III may be summarized as follows:

(1) Plaintiffs failed to state a claim upon which relief can be granted.

(2) The State Board is not a proper party defendant.

(3) Plaintiffs failed to allege the existence of a "controversy".

(4) Plaintiffs failed to allege enforcement by the State Board of the challenged statute and therefore the court should abstain from interpreting the state statute.

(5) There is relief available to plaintiffs in state courts and agencies.

The grounds relied upon by defendant Singleton to sustain his motion to dismiss Count II may likewise be summarized as follows:

(1) The declaratory relief prayed for does not constitute a "case or controversy ripe" for determination by this Court.

(2) Plaintiffs lack standing to litigate the constitutional questions presented.

(3) Injunctive relief cannot be granted in that the plaintiffs are not susceptible to irreparable harm by virtue of enforcement of the challenged statute.

(4) Plaintiffs have not exhausted administrative remedies.

(5) Plaintiffs could not personally suffer harm for which relief can be granted under 42 USC 1983.

COUNT I

R. S. Mo. 431.061 (See Footnote 1), which plaintiffs seek to attack in Counts I and III, was enacted in 1971 by the Missouri General Assembly as Section 1 of House Bill 73 and must be read and construed in connection with R. S. Mo. 431.062[2] and 431.063,[3] which were Sections 2 and 3 of

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[2] 431.062. *Minor cannot disaffirm contract, when—parents or guardian not liable, exception—disclosure by physician authorized, when*

Whenever a minor is examined, treated, hospitalized, or receives medical or surgical care under section 461.061:

(1) His consent shall not be subject to disaffirmance or revocation because of minority;

(2) The parent, parents, or legal guardian shall not be liable for payment for such care unless the parent, parents, or legal guardian has expressly agreed to pay for such case;

(3) A physician or surgeon may with or without the consent of the minor patient, advise the parent, parents, or legal guardian of the examination, treatment, hospitalization, medical and surgical care given or needed if the physician or surgeon has reason to know the whereabouts

House Bill 73. *Mitchem* v. *Perry*, 390 S. W. 2d 600.603 (Mo. App. 1965). When so read and construed it is apparent that R. S. Mo. 431.061 only relates to minors' ability to contractually bind themselves to pay for medical treatment for pregnancy, venereal disease and drug abuse. It is true that under R. S. Mo. 431.061(1) the treatment for pregnancy for which an unmarried minor may contractually bind herself excludes abortions. The effect of this exclusion is simply to leave the law unchanged as it relates to contracts for abortion. That is to say that a minor may not be held contractually liable for the cost of receiving an abortion unless she ratifies the debt contracted after she reaches majority. R. S. Mo. 431.060. This does not constitute a prohibition against giving abortions to minors.

Neither the statute under attack, R. S. Mo. 431.061, nor the two statutes enacted as part of the same bill (R. S. Mo.

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of the parent, parents, or legal guardian. Such notification or disclosure shall not constitute libel or slander, a violation of the right of privacy or a violation of the rule of privileged communication. In the event that the minor is found not to be pregnant or not afflicted with a venereal disease or not suffering from drug or substance abuse, the no information with respect to any appointment, examination, test or other medical procedure shall be given to the parent, parents, legal guardian or any other person.

[3] 431.063. *Minor's consent legally binding, when*

Any person, under the age of twenty-one years, who is examined, treated, hospitalized or who receives medical or surgical treatment under sections 431.061 to 431.063 may give legal consent, and no person who administers such medical or surgical treatment shall be liable, except for negligence, for treating such minor without advising the parent, parents, or legal guardian.

431.062 and 431.063) provide any sanctions for the performance of an abortion on an unmarried minor without parental consent. In fact, Missouri does not in light of *Roe* v. *Wade*, 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), *Doe* v. *Bolton*, 410 U. S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), and *Rodgers* v. *Danforth*, Civ. No. 18360-2 (W.D. Mo.), affirmed November 19, 1973, 42 Law Week 3301, No. 73-426 (copy of opinion attached), at this time have sanctions for abortions performed on adults or minors as long as the abortionist is a licensed physician.

Plaintiffs contend in their affidavits filed in opposition to the defendants' motions to dismss that they fear reprisals from the defendant State Board, in that the State Board may discipline them under R. S. Mo. 334.100 based upon their past performances of abortions and anticipated future performances of abortions upon unmarried minors, without parental consent, on a non-emergency basis. R. S. Mo. 334.100 provides, in part, that a licensee may be placed on probation or the license suspended or revoked when a physician is found guilty of unprofessional or dishonorable conduct. That statute then continues, stating:

> "Without limiting the foregoing general language, the following specifications shall be deemed unprofessional and dishonorable conduct within the meaning of this section:
>
> • • • • • • •
>
> "(3) Committing an unlawful abortion;"

As pointed out above, since the decisions in *Wade*, *Bolton* and *Rodgers*, supra, and the failure of the Missouri Legislature to enact a statute within permissible limits of those cases, Missouri no longer has any prohibition against abortion, when it is performed by a physician. Therefore, any abortion performed by a licensed physician is not an unlawful abortion. What plaintiffs seek in reality is a declaratory judgment by this Court that the performance of an abortion by a licensed physician on an unmarried minor without parental consent on a non-emergency basis is not unprofessional and dishonorable conduct under R. S. Mo. 334.100.

In order for this Court to rule on the constitutionality of the statutory wording "but excluding abortion" in R. S. Mo. 431.061 under the Declaratory Judgment Act, 28 USC 2201, as prayed for in plaintiffs' complaint, there must exist an "actual controversy" between the parties and without such actual controversy this Court is without power to grant declaratory relief. *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 61 S. Ct. 510, 85 L. Ed. 826 (1941). In *Golden* v. *Zwickler*, 394 U. S. 103, 108, 89 S. Ct. 956, 22 L. Ed. 2d 113 (1969), the Supreme Court said:

> "'[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, "concrete legal issues, presented in actual cases, not abstractions," are requisite. This is as true of declaratory judgments as any other field.' *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 89 (1947). 'The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941)."

From the foregoing, it is clear that the ingredients necessary to sustain a complaint for declaratory judgment are: (a) a substantial controversy; (b) between parties having adverse legal interests; and (c) the controversy must possess "immediacy and reality." The plaintiffs here do not claim that they have ever been threatened with disciplinary action by the State Board or that disciplinary action by the State Board is even likely. The most that can be said of the plaintiffs is that they feel uneasy or inhibited in performing abortions on minors without parental consent. The mere possibility or even probability that the plaintiffs may sometime in the future be adversely affected by a disciplinary action of the State Board not yet threatened does not create an "actual controversy" which is a prerequisite created by the clear language of the Declaratory Judgment Act. *Garcia* v. *Brownell,* 236 F. 2d 356 (9th Cir. 1956), cert. denied 362 U. S. 963, 80 S. Ct. 880, 4 L. Ed. 2d 878 (1960).

COUNT II

In Count II plaintiffs challenge the constitutionality of the statutory wording, "shall not include abortions unless such abortions are medically indicated", contained in R. S. Mo. 208.152(12). The pertinent portions of R. S. Mo. 208.152 are as follows:

> "Benefit payments for medical assistance may be made on behalf of those eligible needy persons who are unable to provide for it in whole or in part, with any payments to be made on the basis of the reasonable cost of the care or reasonable charge for the services as defined and determined by the division of welfare unless otherwise hereinafter provided, for the following:
>
> • • • • •
>
> "(12) Family Planning Services are defined by Federal rules and regulations provided, however, that such Family Planning Services shall not include abortions unless such abortions are medically indicated."

As established by the above statute, the medical reimbursements for medical assistance in the area of "medically indicated" abortions are made on behalf of those eligible needy persons who are unable to provide for it in whole or in part. Since the medical payments are made "on behalf" of the needy individual, there can be no argument but that the welfare recipient is the intended beneficiary of this statutory section. It is the welfare recipient and not their physician who by Federal Title 45, Public Welfare Chapter II, Social Rehabilitation Services (Federal Register, Vol. 38, No. 157, Wed., August 15, 1973) under part 205.10(a) (5) is granted a right to a hearing if that person's claim for medical reimbursement assistance is denied and it is the welfare recipient who is afforded the right to appeal such decision through the administrative process required by federal regulation and established under R. S. Mo. 208.156. This raises the question as to whether the plaintiffs have standing to litigate the constitutionality of the statute here in question.

Plaintiffs state in their affidavits filed in opposition to defendant Singleton's motion to dismiss that they have provided and anticipate providing abortions to welfare patients who are eligible for Medicaid payments for medical assistance, and that those patients who have submitted applications for such payments have been refused and that they anticipate future refusals by defendant Singleton based upon the challenged language in R. S. Mo. 208.152. Plaintiffs further state that such refusals by defendant Singleton deter plaintiffs from the practice of medicine in the manner they consider to be most expertise and beneficial to their patients.

Plaintiffs cite *Doe* v. *Scott*, 321 F. Supp. 1385 (N.D. Ill. 1970), *Roe* v. *Wade*, supra, and *Doe* v. *Bolton*, supra, as authority for their contention that they have standing to litigate the constitutionality of R. S. Mo., 208.152. *Doe* v. *Scott*, supra, was an action for declaratory and injunctive relief brought to declare an Illinois criminal abortion statute unconstitutional. The plaintiff-physicians in *Scott* alleged that the existence of the Illinois criminal abortion statute interfered with and adversely affected their ability to conduct their medical practices with proper regard for their patients' best interest. The district court in *Scott*, l.c. 1388, held:

> "[T]he physician-plaintiffs have standing to raise the claims of their patients even if we assume that no independent claim of theirs could withstand a motion for judgment of the pleadings."

The court in *Scott* cited *Griswold* v. *Connecticut*, 381 U. S. 479, 481, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) and *Barrows* v. *Jackson*, 346 U. S. 249, 257, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953) as supporting authority for its decision that the plaintiff-physicians had standing to raise the claims of their patients with respect to the constitutionality of the Illinois abortion statute.

In *Griswold* v. *Connecticut*, supra, the appellant-physician had been convicted as an accessory for giving information and medical advice on how to prevent conception in violation of a Connecticut statute making it a crime for any person to use any drug or article to prevent conception. In relation to the appellant-physician's standing the Supreme Court said, l.c. 481:

> "We think that appellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship. *Tileston* v. *Ullman*, 318 U. S. 44, is different, for there the plaintiff seeking to represent others asked for a declaratory judgment. In that situation we thought that the requirements of standing should be strict, lest the standards of 'case or controversy' in Article III of the Constitution become blurred. Here those doubts are removed by reason of a criminal conviction for serving married couples in violation of an aiding-and-abetting statute. Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be, a crime."

In *Barrows* v. *Jackson*, supra, a white defendant who was a party to a racially restrictive covenant was being sued for damages by the covenantors because she had conveyed her property to Negroes. The defendant was allowed to raise the issue that enforcement of the covenant violated the rights of prospective Negro purchasers to equal protection of the law, although no Negro was a party to the suit. The Supreme Court said, l.c. 255-256:

> "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party. Reference to this rule is made in varied situations. See *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 149-154 (concurring opinion). The requirement of standing is often used to describe the constitutional limitation of the jurisdiction of this Court to 'cases' and 'controversies'. See *Coleman* v. *Miller*, 307 U. S. 433, 464 (concurring opinion). Apart from the jurisdictional requirement, this Court has developed a complementary rule of self-restraint for its own goverance (not always clearly distinguished from the constitutional limitation) which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others. See *Ashwander* v. *Tennessee Valley Authority*, 297

U. S. 288, 346-348 (concurring opinion). The common thread underlying both requirements is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation. This principle has no application to the instant case in which respondent has been sued for damages totaling $11,600, and in which a judgment against respondent would constitute a direct, pocketbook injury to her."

The Supreme Court went on to say in relation to its rule on standing, l.c. 257:

"This is a salutary rule, the validity of which we reaffirm. But in the instant case, we are faced with a unique situation in which it is the action of the state *court* which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained. Cf. *Quong Ham Wah Co.* v. *Industrial Acc. Comm'n,* 184 Cal. 26, 192 P. 1021."

Roe v. *Wade,* supra, and *Doe* v. *Bolton,* supra, the other two cases relied upon by plaintiffs in the instant case to support their contention that they have standing, are somewhat similar in that they both attack the constitutionality of state criminal abortion statutes. In *Roe* v. *Wade,* supra, the Supreme Court held the plaintiff-physician in *Wade* was under indictment for violating the Texas criminal abortion statute and the Supreme Court dismissed his complaint and remitted him to his defenses

in the state criminal proceedings against him where he could raise the constitutionality of the statute under which he was charged. In *Doe* v. *Bolton,* supra, the plaintiff-physicians alleged that the Georgia criminal abortion statute chilled and deterred them from practicing their profession. The Supreme Court in holding that the plaintiff-physicians had standing said, l.c. 188:

"[T]he physician-appellants, who are Georgia licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted or threatened with prosecution for violation of the State's abortion statutes. The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."

In the instant case the plaintiff-physicians have not been convicted as accessories to a criminal offense as the plaintiff-physician was in *Griswold* v. *Connecticut,* supra. The plaintiff-physicians here do not present a unique situation such as was presented to the court in *Barrows* v. *Jackson,* supra, and they are not being sued for damages as in *Barrows,* where a judgment against them would constitute a direct pocketbook injury. Also in *Barrows,* the Supreme Court felt it would be difficult if not impossible for the Negroes whose rights were being asserted by the defendant therein to present their grievance before any court. This is not the situation here for in the instant case the persons whose rights the plaintiffs are really asserting

(their patients who are eligible to receive Medicaid payments) have a statutory right to a hearing before a state agency as stated above where they can present their grievance and if not satisfied they can carry their grievance on to the appropriate court. Neither are the plaintiff-physicians herein subject to the direct operation of any criminal anti-abortion statute as the plaintiff-physicians were in *Roe* v. *Wade,* supra, and *Doe* v. *Bolton,* supra, and, therefore, cannot assert a sufficiently direct threat of personal detriment as the plaintiff-physicians in those cases could. The only possible detriment the plaintiffs in the instant case can suffer under their contentions in Count II is the possibility that their patients who are eligible for medical assistance under R. S. Mo. 208.152 will not be able to pay for the services the plaintiffs have rendered to them in giving them an abortion operation.

Keeping in mind that it is the welfare recipient in whose behalf medical assistance payments under R. S. Mo. 208.152 are made and that it is the welfare recipient and not their physicians who have a right to a hearing if their medical assistance claims are denied, and that the plaintiff-physicians are not prohibited from performing abortions, this Court finds that the standing requirement of *Flast* v. *Cohen,* 392 U. S. 83, 102, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968) that there be a logical nexus between the status asserted by the plaintiffs and the claim they seek to have adjudicated is not satisfied by the litigative posture of the plaintiff-physicians herein, and, therefore, they lack standing to challenge the constitutionality of the statute in question here. This is not to say that the issue the plaintiffs bring to this Court is not justiciable, but is only to say that these plaintiffs are not the proper parties to request an adjudiciation. *Flast* v. *Cohen,* supra.

Count III

Plaintiffs contend that the word "pregnancy" in R. S. Mo. 431.061 is vague and ambiguous and *if* it is interpreted, construed and applied to exclude the giving, prescribing and providing of contraceptive devices to minors without parental consent then it would be subject to all of the constitutional defects alleged in Count I.

It is apparent from the plaintiffs' pleadings in Count III that the plaintiffs do not present an actual controversy in Count III as required under the Declaratory Judgment Act. Therefore, this Court's reasoning in relation to Count I and the law applied there equally applies here in Count III.

In view of this Court's findings it is not necessary to discuss the defendants' remaining contentions.

Accordingly, for the reasons above stated, the motion of the defendant, State Board, to dismiss Counts I and III for lack of controversy, and the motion of defendant Singleton to dismiss Count II for lack of standing, are sustained.

The Clerk of the Court will prepare and enter the proper order dismissing the case.

WILLIAM H. WEBSTER
Circuit Judge

JAMES H. MEREDITH
U. S. District Judge

ROY W. HARPER
U. S. District Judge

APPENDIX TO MEMORANDUM

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

WESTERN DIVISION

SAMUEL U. RODGERS, M.D., et al.,
Plaintiffs,

vs.

JOHN C. DANFORTH, Attorney General of the State of Missouri, et al.,
Defendants.

Civil Action No. 18360-2

MEMORANDUM OPINION AND JUDGMENT

This complaint attacked the constitutionality of Missouri criminal abortion statutes. The basic statute, Section 559.100, Missouri Revised Statutes, 1959, as amended, declares the production of all miscarriages and abortions a felony "unless the same is necessary to preserve her (the mother's) life or that of an unborn child," with different penalties for the death of a "quick" and "unquick" foetus. The complaint sought both declaratory and injunctive relief.

Because of the prayer for injunctive relief, a three-judge federal court was convened under the provisions of Title 28, U.S.C. Section 2281.

A motion to intervene was filed by "Baby Doe" and an M.D. on behalf of all unborn children "who will or may be adversely affected by the action before this court."

The defendant named in the original complaint was the Attorney General of Missouri, in his official capacity, and later, by an amended complaint, the Prosecuting Attorney of Jackson County, Missouri, was added as a party defendant, who was made the class representative of all prosecuting attorneys in Missouri, by subsequent court order.

The Court then granted the motion of the defendants to dismiss this action on the sole grounds of abstention, and ordered the cause dismissed without prejudice. The plaintiffs appealed this judgment to the Supreme Court.

While the appeal was pending, that Court decided the cases of *Roe* v. *Wade,* 410 U.S. (1973), and *Doe* v. *Bolton,* 410 U.S. (1973), and remanded this case to this Court "for further consideration in light of" these two cases.

After the remand, the defendants filed an answer denying the existence of a justiciable controversy and alleging that the attacked statutes are justified by compelling state interests, to-wit: the protection of human life and the protection of potential human life. The answer requested a jury trial under either Rule 38 or 39, Federal Rules of Civil Procedure.

The plaintiffs filed a motion for summary judgment based on affidavits of two of the plaintiffs who are medical doctors, and a third person who is Executive Director of Suicide Prevention, Inc., a United Fund agency in St. Louis.

The defendant Attorney General has filed lengthy suggestions in opposition to the motion for summary judgment, accompanied by the affidavit of an M.D. which controverts affidavits filed by plaintiffs as to the "chilling effect" of Missouri abortion statutes on the practice of their profession by doctors in Missouri.

The argument of the Attorney General of Missouri is

that in *Roe* v. *Wade, supra*, the Supreme Court did not determine "whether an unborn child is human life"; that this is a question of fact which can only be determined by triers of the fact after hearing evidence from expert witnesses; that if human life exists from the moment of conception the State has a compelling interest to protect this life; and that summary judgment cannot be granted when such an issue of fact exists.

This Court finds that the teachings of *Roe* v. *Wade, supra*, completely contradict this argument. The opinion stated that the "existence of life from the moment of conception" is the official belief of the Catholic Church, of many non-Catholics, and "a view strongly held . . . by many physicians."

But, the opinion states, "We need not resolve the difficult question of when life begins." No statement could be clearer. Whether life begins at conception, at quickening, at viability, or at birth (the alternatives discussed in the opinion), the Court held that resolution of this question would not affect the decision.

The defendants' prayer for trial of the factual issue of "when life begins" is denied.

The lack of justiciable controversy issue raised by the answer is fully discussed and ruled upon in the case of *Doe* v. *Bolton, supra*. That case holds:

> "We conclude, however, that the physician-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes."

Four of the plaintiffs in this case are eminent, Missouri-

licensed obstetricians and gynecologists, and their standing as plaintiffs, under the teachings of *Doe* v. *Bolton* cannot be questioned.

In *Roe* v. *Wade* the Court quoted from the Texas statute it found unconstitutional and stated, "Similar statutes are in existence in a majority of the States.[2]" Footnote 2 lists "Mo. Rev. § 559.100 (1969);"

There can be no question that this Missouri statute referred to in that opinion is unconstitutional under the teachings of the two Supreme Court cases which we were mandated to consider. The other two statutes attacked are based upon the validity of § 559.100 and must similarly be held unconstitutional. The plaintiffs' motion for summary judgment will be granted.

In both *Roe* v. *Wade* and *Doe* v. *Walton* the Supreme Court affirmed the lower court's granting of a declaratory judgment and denial of injunctive relief, stating in both cases that the Court would assume that the state prosecutorial authorities would give full recognition and credence to the Court's judgment as to the unconstitutionality of the State statute.

In this case the defendant Attorney General has not given "full recognition" or "credence" to the ruling of the Supreme Court. It does not appear that a declaratory judgment in this case, in view of the Attorney General's publicly stated position, will suffice to guarantee the constitutional rights of pregnant women and their consulting doctors as decided by the Supreme Court, and, it is therefore

ORDERED that the defendant Attorney General of the State of Missouri, and the defendant class of all Prosecuting Attorneys in the State of Missouri be, and they hereby are, enjoined from instituting any criminal prosecutions,

complaints for warrants, or complaints for search warrants under, or by authority of, unconstitutional Sections 542.380(3), 559.100, or 563.300, Revised Statutes of Missouri, 1969. Costs taxed to defendant Attorney General in his official capacity.

FLOYD R. GIBSON
Circuit Judge

ELMO B. HUNTER
District Judge

WILLIAM R. COLLI SON
District Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

(Title Omitted in Printing)

PLAINTIFFS' MOTION FOR LEAVE OF COURT TO ADD PARTIES PLAINTIFF(S)

June 17, 1974

Come now plaintiffs, pursuant to Rule 21 of the Federal Rules of Civil Procedure, and move this Court for an Order granting plaintiffs leave of County until July 15, 1974 in which time to add parties plaintiff(s) in Count II herein and as grounds and reasons therefor state:

1. On or about May 31, 1974 this Court entered its "Order and Judgment" dismissing Count II herein for lack of standing.

2. In the Court's "Memorandum", filed on or about May 31, 1974 in support of said "Order and Judgment", the Court stated that the issues raised by Count II are justiciable but that these plaintiffs are not the proper parties to request an adjudication thereof.

3. Should leave be granted by this Court as herein requested plaintiffs will, on or before July 15, 1974, add parties plaintiff(s), who are welfare recipients aggrieved by the statutory language of §208.152 R.S.Mo. (1973 Supp.), herein challenged, and who therefor possess the requisite standing to adjudicate the justiciable issues presented to this Court in said Count II.

4. The relief sought herein will not prejudice defendants but rather will expedite the claim asserted in said County II, by preventing an additional suit relitigating the issues therein presented.

5. The relief sought herein is just and proper.

WHEREFORE, plaintiffs pray for Order of this Court granting leave to plaintiffs until July 15, 1974 in which time to add parties plaintiff(s) in Count II herein.

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FRANK SUSMAN
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St. Louis, Missouri 63105

Attorneys for Plaintiffs

(Certificate of Service Omitted in Printing)

IN THE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

GEORGE J. L. WULFF, JR., M.D., et al.,
Plaintiffs,
vs.
STATE BOARD OF REGISTRATION FOR THE HEALING ARTS, et al.,
Defendants.
} No. 73C 731 (A)

MEMORANDUM AND ORDER

June 24, 1974

This matter is before the Court on plaintiffs' motion pursuant to Rule 21 FRCP to grant plaintiffs leave until July 15, 1974, to add parties plaintiff(s) in Count II of this cause. This motion was filed on June 17, 1974, seventeen days after this Court filed a Memorandum and Order dismissing Count II of plaintiffs' complaint for lack of standing of the plaintiffs therein.

It is hereby ordered that the motion of the plaintiffs pursuant to Rule 21 FRCP for leave until July 15, 1974, to add parties plaintiff(s) in Count II of this cause is denied.

The cases cited by the plaintiffs in support of their position, *Reichenberg* v. *Nelson*, 310 F. Supp. 248 (D. Nebr. 1970) and *Mullaney* v. *Anderson*, 342 U. S. 415, 72 S. Ct. 428, 96 L. Ed. 458 (1952), are not applicable. In the instant cause plaintiffs do not seek to have specific parties

added or substituted as plaintiffs, as was done in the above cited cases. Here plaintiffs ask the court for time to seek out plaintiffs whose litigative posture would satisfy the requirements of standing. This request is completely outside of the bounds of Rule 21 FRCP and is, therefore, denied.

ROY W. HARPER
U.S. District Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

(Title Omitted in Printing)

NOTICE OF APPEAL

Notice is hereby given that plaintiffs, GEORGE J. L. WULFF, JR., M.D., and MICHAEL FREIMAN, M.D., hereby appeal to the United States Court of Appeals for the Eighth Circuit from an "Order And Judgment" dismissing Count II of said cause for lack of standing entered in the above entitled cause on the 31st day of May, 1974.

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Attorneys for Plaintiffs

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1974

George J. Wulff, Jr., M.D., and Michael Freiman, M.D.,
Appellants,
vs.
The State Board of Registration for the Healing Arts
and
Thomas E. Singleton, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare,
Appellee.

No. 74-1484

Appeal from the United States District Court for the Eastern District of Missouri.

December 31, 1974

This cause came on to be heard on the original files for the United States District Court for the Eastern District of Missouri and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by thist [sic] Court that the judgment of the said District Court in this cause be and the same is hereby reversed.

And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court for proceedings consistent with the opinion of this Court this day filed herein.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 74-1484

George J. L. Wulff, Jr., M.D. and Michael Freiman, M.D.,
Appellants.
vs.
Thomas E. Singleton, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

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SUBMITTED: DECEMBER 13, 1974
FILED: DECEMBER 31, 1974

Before MATTHES, Senior Circuit Judge, ROSS and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

This appeal from the order of a statutory three-judge district court dismissing plaintiff's cause of action for lack of standing raises troublesome questions of jurisdiction and procedure as well as a question concerning state interference with the abortion decision. The three-judge court opinion is reported as *Wulff* v. *State Board of Registration*

for *Healing Arts*, 380 F.Supp. 1137 (E.D. Mo. 1974). We reverse.

Appellants, Missouri licensed medical doctors, brought a three count complaint for declaratory and injunctive relief against the Missouri State Board of Registration for the Healing Arts and against Thomas E. Singleton in his capacity as Chief of the Bureau of Medical Services. The complaint challenged the constitutionality of state statutes regarding welfare benefits, claiming that the statutory wording

> is vague and uncertain, deprives plaintiffs and their patients of the right to privacy, deprives plaintiffs of their right to practice medicine according to the highest standards of medical practice, deprives plaintiffs' patients of the fundamental right of a woman to determine for herself whether to bear children, infringes upon plaintiffs' right to render and their patients' right to receive safe and adequate medical advice and treatment, deprives plaintiffs and their patients of the equal protection of the law and due process of law, and constitutes state interference with the abortion decision, all of which is in violation of the United States Constitution.

380 F. Supp. 1137, 1139.

The three-judge court dismissed Count II of the complaint for lack of standing by the medical doctors to challenge the constitutionality of the statute. *See Wulff, supra* at 1144. Appeal was filed in this court.[1]

I. APPELLATE JURISDICTION

The portal question we have goes to the propriety of

[1]The appeal concerns only Count II of the complaint. Appellants do not challenge the district court's ruling on Counts I and III.

an appeal to this court from an order entered by a district court of three judges.[2]

That inquiry has been settled for us in the instant case by the United States Supreme Court's recent decision in *Gonzalez* v. *Automatic Employees Credit Union*, No. 73-858 (filed December 10, 1974), 43 Law Week 4025.

In *Gonzalez* appellant took his appeal directly to the Supreme Court from a three-judge court order dismissing the complaint for lack of standing. The court observed that when the basis of decision by a three-judge court is lack of standing, the case is such that "a single judge could have declined to convene a three-judge court" or "the three-judge court could have dissolved itself, leaving final disposition of the complaint to a single judge." *Gonzalez* at 4028 (footnote omitted). The Court went on to say:

> We hold, therefore, that when a three-judge court denies a plaintiff injunctive relief on grounds which, if sound, would have justified dissolution of the court as to that plaintiff, or a refusal to request the convention of a three-judge court *ab initio*, review of the denial is available only in the Court of Appeals.

43 Law Week 4025, 4028-29. This court has jurisdiction in the instant case.

[2]28 U.S.C. § 1253 provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

II. STANDING

The district court found that there was no logical nexus between the status of appellant-physicians and the claims they sought to have adjudicated. *Flast* v. *Cohen*, 392 U.S. 83 (1968). We disagree.

This court made clear in *Nyberg* v. *City of Virginia*, 495 F.2d 1342 (1974), *cert. denied*, 95 S.Ct. 169:

> We think that the Supreme Court in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) has clearly paved the way for physicians to assert their constitutional rights to practice medicine, which now includes the right to advise and perform abortions. • • •
>
> • • •
>
> Clearly the claims of medical doctors to "freely practice medicine according to the highest medical standards without arbitrary outside restraints" are inextricably bound up with the privacy rights of women who seek abortions. YWCA v. Kugler, 342 F. Supp. 1048, 1055 (D.N.J. 1972). This is sufficient to present a justiciable controversy and confer standing on the physicians who bring this action. *See* Griswold v. Connecticut, 381 U.S. 479, 481, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Abele v. Markle, 452 F.2d 1121, 1125 (CA2 1971); stay granted, 409 U.S. 908, 93 S.Ct. 212, 34 L.Ed. 2d 169 (1972), remanded for consideration in light of Roe and Doe, 410 U.S. 951, 93 S.Ct. 1417, 35 L.Ed.2d 683 (1973); Doe v. Turner, 361 F.Supp. 1288, 1289 (D. Iowa 1973) (3 judge court); Freeman & Bass, P. A. v. State of N.J. Com'n of Invest., 359 F.Supp. 1053, 1059 (D.N.J. 1973); *cf.* O'Shea v. Littleton, 414 U.S. 488, 94 S.Ct. 699, 38 L.Ed.2d 674 (1974). Furthermore, the practical effect of the stringent limitation on the use of

> hospital facilities for performing abortions is to arbitrarily bar the physicians from activities that directly affect their economic interests. Abele v. Markle, *supra*, 452 F.2d at 1125; *see also*, Data Processing Service v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968).

We reiterated the same thought more succinctly in *Word* v. *Poelker*, 495 F.2d 1349, 1350 (8th Cir. 1974), where we said:

> It is now clear from the decisions in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) that a sweeping regulation of the abortion decision and its implementation raises clear questions of constitutional dimension regarding a medical doctor's right to practice. Doe v. Bolton, *supra* at 188, 93 S.Ct. 739; Roe v. Wade, *supra* at 165 of 410 U.S., 93 S.Ct. 705. • • •.

See Orr v. *Koefoot*, 377 F.Supp. 673, 678 (D. Neb. 1974); *Poe* v. *Menghini*, 339 F.Supp. 986, 990 & note 8 (D. Kan. 1972); *Doe* v. *Scott*, 321 F.Supp. 1385, 87-88 (N.D. Ill. 1970); *see also Wounded Knee Legal Defense/Offense Committe* v. *F.B.I.*, No. 73-1908 (8th Cir., filed November 7, 1974), slip opinion at 6.

The statute in question interferes with the doctor-patient relationship as it relates to the abortion decision. It injects unnecessarily restrictive rules upon a constitutionally protected decision of doctor and patient as surely as did the statutes in the above cited cases. The statute interferes with the appellants' practice of medicine both professionally and monetarily.

We think that there is no question that (1) appellants allege that the challenged acts have caused them "injury

in fact, economic or otherwise" and (2) "the interests sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 152-53 (1970). To hold otherwise in light of the authority cited above would defy logic. These medical doctors have standing to pursue this action.

III. THIS COURT'S JURISDICTION TO REACH THE MERITS

We are urged by appellants to reach the merits of this case rather than remand to the three-judge court. This question is not without its difficulty. There is little direct authority for the propriety of our reaching the merits. Nevertheless, we are satisfied that under the circumstances of this case and in the interest of judicial economy and logic we should now address the merits of this controversy.

Of course, the three-judge court has not determined the merits. This court is not generally a court of original jurisdiction. Even so, there is authority for the proposition that when a case is properly before a Court of Appeals, the court has the power "to do what plainly ought to be done." *Mercury Motor Express, Inc.* v. *Brinke*, 475 F.2d 1086, 1091 (5th Cir. 1973), *citing* 9 Moore's Federal Practice § 110.25 [1] (2d ed. 1972).

In reaching the merits of a case which was before the court pursuant to an interlocutory appeal under 28 U.S.C. § 1292(b) this court said:

> We adhere to the proposition that it would be improper to consider "grave constitutional questions" where there exists "reasonable likelihood" that further proceedings could help clarify the issues. *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194, at 213, 55 S.Ct. 187, 79 L.Ed. 281. However, in the present proceeding no further pleadings or evidence is necessary for "refinement or clarification of the issues." *United States* v. *Petrillo*, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877; *United States* v. *Fabre, Inc.*, M.D. Ga., 206 F.Supp. 523. And we should dispose of all controversies "as expeditiously as is consistent with proper judicial administration." *Turner* v. *City of Memphis*, 369 U.S. 350, 82 S.Ct. 805, 7 L.Ed.2d 762.

Board of Managers of Ark. Tr. Sch. for Boys v. *George*, 377 F.2d 228, 231 (8th Cir. 1967). In addition, Mr. Justice Clark in writing for the Supreme Court has indicated that effective judicial administration requires disposal of the case on appeal rather than remanding, where the point to be decided is clear. *Levin* v. *Mississippi River Fuel Corporation*, 386 U.S. 162, 170 (1967), 87 S.Ct. 927, 932.

It might be argued that the above authority, though persuasive, should not apply in the instance of an appeal to the Court of Appeals from a statutory three-judge court.

The Supreme Court has made it clear that the three-judge court mandate must be construed quite narrowly. "Congress established the three-judge court apparatus for one reason: to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal district judge." *Gonzalez, supra* 43 Law Week 4027.

For this court to get to the heart of the matter and dispose of this case on the merits will not conflict with the policy behind the statute. Indeed, we think this case is particularly proper for disposition in this court since "[w]hile § 2281 calls for three judges to enjoin a statute 'upon the ground' of its 'unconstitutionality,' we [the Supreme Court] have held that three judges are not in fact necessary where the unconstitutionality of the statute is obvious

and patent * * *." *Gonzalez, supra* at 4027, footnote 14, *citing Bailey* v. *Patterson*, 369 U.S. 31 (1962).

The statute in question is obviously unconstitutional, and it is our view that the case might well have been decided by one federal judge. *See generally Roe* v. *Norton*, 380 F.Supp. 726, 728 (D. Conn. 1974). Accordingly, we choose to make final determination of this case.

IV. MERITS

The statute before the court states:

> Benefit payments for medical assistance may be made on behalf of those eligible needy persons who are unable to provide for it in whole or in part, with any payments to be made on the basis of the reasonable cost of the care or reasonable charge for the services as defined and determined by the division of welfare unless otherwise hereinafter provided, for the following:
>
> * * *
>
> Family planning services are defined by federal rules and regulations provided, however, that such family planning services shall not include abortions unless such abortions are medically indicated.

As in *Word* v. *Poelker, supra* 495 F.2d 1349, 1350, the issue in this case concerns the facial constitutionality of the statute viewed against the glare of the Supreme Court's decisions in *Roe* v. *Wade, Doe* v. *Bolton*, and the precedent which has developed as a result of those cases.

We find it unnecessary to review again *Roe* and *Doe* or what this court has said in applying those cases. Suffice it to say that the statute here provides medical payments if the pregnancy is carried to term or for therapeutic abortions but not if a non-therapeutic abortion is performed. This classification is a clear violation of the Equal Protection Clause of the Fourteenth Amendment.

There is ample case authority for the holding that a welfare payments statute which places special regulation on abortion but not upon other medical procedures cannot stand in light of the Supreme Court decisions. *Doe* v. *Rose*, 499 F.2d 1112 (10th Cir. 1974); *Doe* v. *Westby*, ——F.Supp. ——, No. 74-5017 (W.D. S.D., filed September 24, 1974); *Roe* v. *Norton*, 380 F.Supp. 726 (D. Conn. 1974); *Doe* v. *Wohlgemuth*, 376 F. Supp. 173 (W.D. Pa. 1974); *Doe* v. *Rompton*, 366 F.Supp. 189 (D. Utah 1973); *Klein* v. *Nassau Co. Medical Center*, 347 F.Supp. 496 (E.D. N.Y. 1972); *see also Doe* v. *Hale Hospital*, 500 F.2d 144 (1st Cir. 1974).

The control meted out by this statute does not give proper consideration to the conflicting constitutional interests involved. *Word, supra* at 1351. It is further invalid since the welfare parent and her physician are discriminated against by reason of the patient's poverty. *Compare, e.g., Klein, supra.*

We declare R.S.Mo. 208.152(12) to be unconstitutional on its face. Injunctive relief should be unnecessary. We assume that the state will abide by the ruling of this court and that medical assistance payments will be made on a nondisparate basis to those eligible needy persons who elect to carry their pregnancy to term or who receive therapeutic abortions and also to those who elect nontherapeutic abortions.

Reversed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

(Title Omitted in Printing)

PETITIONER'S MOTION FOR REHEARING

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Attorneys for Petitioners-Appellants

PETITIONERS' MOTION FOR REHEARING

Come now petitioners (appellants herein) and pursuant to Rule 40 of the Federal Rules of Appellate Procedure respectfully move this Honorable Court to consider the following two (2) points with respect to the judgment and opinion, heretofore rendered on December 31, 1974.

Point I

Petitioners suggest that the conclusionary statement of this Honorable Court in said judgment and opinion that "(W)e declare R.S.Mo. 208.152(12) to be unconstitutional on its face" (Slip Opinion, page 9), may be broadly interpreted by some to imply the rejection of R.S.Mo. 208.152(12) in its entirety for reason of its unconstitutionality.

R.S.Mo. 208.152(12) provides, *in toto*,

> "(12) Family Planning Service as defined by Federal rules and regulations provided, however, that such Family Planning Services shall not include abortions unless such abortions are medically indicated."

Such an interpretation would exceed appellants' claim for relief as contained in their "Complaint For Declaratory Judgments and Injunctive Relief", paragraph 21, requesting the trial court,

> "21. Issue a declaratory judgment holding that the wording 'shall not include abortions unless such abortions are medically indicated' contained in Missouri Revised Statutes, Title 12, Chapter 208, Section 208.152, subsection (12) (1973) is in violation of the constitutional rights of plaintiffs and their patients, . . ."

Such a holding would be more extensive than that sought by appellants' and would be greatly detrimental to appellants and to their patients; since to invalidate subsection 12 in its entirety would eradicate funding for all forms of family planning, presently provided by Missouri state medicaid program. The offensive wording, "shall not include abortions unless such abortions are medically indicated" is properly severable.

As stated in 16 *Am.Jur.*2d, "Constitutional Law", Section 186, pp. 414-415,

> "If, however, the constitutional and the unconstitutional portions are so dependent on each other as to warrant the belief that the legislature intended them to take effect in their entirety, it follows that if the whole cannot be carried into effect, it will be presumed that the legislature would not have passed the residue independently, and accordingly, the entire statute is invalid." . . .

"[I]f the purpose of a statute is to accomplish a single object only and some of its provisions are unconstitutional and void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portions."

As cited with approval in *State ex rel. State Board of Medication* v. *Pigg*, 244 S.W.2d 75 (Mo. 1951) at pp. 84-85,

"The rule is stated in State ex rel. Transport Mfg. & Equipment Co. v. Bates, 359 Mo. 1002, 224 S.W.2d 996, 1001, as follows: 'It is generally true if the invalid provision of a statute and the residue thereof are wholly independent of each other, readily separable, and completely distinct; and if the residue is of itself complete, sensible and capable of being executed that the invalid provision will fall and the residue of the statute will stand. * * * The fact that the residue of an act remaining after a portion has been declared invalid may be complete in and of itself is not always sufficient to sustain it. If the invalid portion is so connected with the residue of the statute as to furnish the consideration for the enactment of the residue and as to warrant the belief that they were intended as a whole and that the Legislature would not have passed the part remaining had it known the other part would be held invalid, then the entire act must fall.' And see 50 Am.Jur. 354, Statutes, Sec. 353; 11 Am.Jur. 834, Const.Law, Secs. 152 and 155."

The cited authority leaves no doubt as to the severability of the constitutionally offensive wording from the remainder of said subsection 12.

Accordingly, petitioners respectfully move this Honorable Court to amend its judgment and opinion to conform unequivocably with petitioners' relief as prayed, contained in their "Complaint", and to hold the challenged wording

of said subsection 12 ("shall not include abortions unless such abortions are medically indicated") to be both unconstitutional and severable from the remaining portions of said subsection.

POINT II

Petitioners' request that pursuant to paragraph 22 of appellants' "Complaint", specifically requesting the trial court to "award to plaintiffs a reasonable attorneys' fee", that this Honorable Court award same based upon the "Affidavit" of petitioners' counsel, *infra.*

The award of such fees has been recognized by other courts both under the theory of a "common fund" (*Mills,* et al. v. *The Electric Auto-Lite Company,* et al., 396 U.S. 375 [1970]) and the theory of the "private attorney general" (*LaRaza Unida,* etc., et al. v. *Volpe,* et al., 57 F.R.D. 94 [N.D.Cal. 1972], *affirmed on other grounds,* 488 F.2d 559 [9th Cir. 1973] and *Miller,* et al. v. *Amusement Enterprises, Inc.,* 426 F.2d 534 [5th Cir. 1970]). Both such theories are applicable here.

Other leading cases awarding fees in similar cases include *Brandenburger,* et al. v. *Thompson,* 494 F.2d 885 (9th Cir. 1974) involving constitutional challenge to state welfare requirement, *Hoitt,* et al. v. *Vitek,* et al., 495 F.2d 219 (1st Cir. 1974) involving deprivation of prisoners' constitutional rights, *Jordan,* et al. v. *Fusari,* 496 F.2d 646 (2nd Cir. 1974) involving constitutionality of state's unemployment compensation plan and *Class* v. *Norton,* —F.2d— (No. 74-1702, 2nd Cir. Oct. 10, 1974) involving constitutional challenge to policy of state welfare commissioner. For a detailed list of twelve distinct factors to be considered in determining the amount of attorneys' fees to be awarded, see *Johnson,* et al v. *Georgia Highway Express, Inc.,* 488 F.2d 714, 717-719 (5th Cir. 1974). See, also, *Scott* v. *Home Mutual Telephone Co.,* 510 S.W.2d 793 (Mo.Ct.App. 1974).

The award of attorneys' fees in this case will further serve notice upon the State of Missouri and its political subdivisions that they may not cavalierly continue to pass legislation unconstitutionally restricting the rights of physicians and their patients in the area of abortion, without bearing some part of the burden of those who must challenge the same to be free from the oppressive and chilling yoke it imposes. For a partial history in Missouri, see *Rodgers,* et al. v. *Danforth,* et al., —U.S.—, 38 L.Ed2d 327 (Nov. 19, 1973), *Word,* et al. v. *Poelker,* et al., 495 F.2d 1349 (8th Cir. 1974), *Doe,* et al. v. *Poelker,* et al., 497 F.2d 1063 (8th Cir. 1974) cause no. 73C565(A) still pending E.D.Mo., *Wulff,* et al. v. *Singleton,* —F.2d—(8th Cir., Dec. 31, 1974) and *Planned Parenthood of Central Missouri,* et al. v. *Danforth,* et al., cause no. 74-416C(A) pending E.D.Mo.

The tragedy of this legislative pattern is the existence of its provisions during the time necessary to obtain favorable appellate decisions. Each and every case to date has been summarily and adversely disposed of by the district court and preliminary injunctive relief denied. Each and every case has been reversed upon appeal.

Accordingly, petitioners respectfully move this Honorable Court to award reasonable attorney's fees in this cause.

Respectfully submitted,

FRANK SUSMAN
SUSMAN, SCHERMER, WILLER & RIMMEL
7733 Forsyth Boulevard, Suite 1100
St. Louis, Missouri 63105
(314) E25-7300

Attorneys for Petitioners-Appellants

AFFIDAVIT

Comes now Affiant, Frank Susman, and states:

1. He is a duly licensed attorney admitted to practice before the bars of the State of Missouri, the United States Eighth Circuit Court of Appeals and the United States Supreme Court, among others.

2. He is a partner in the firm of Susman, Schermer, Willer and Rimmel and he and said firm are counsel for appellants in *Wulff, et al.* v. *Singleton,* —F.2d— (No. 74-1484, 8th Cir. Dec. 31, 1974).

3. He devotes a significant portion of his law practice to the field of appellate, constitutional matters and since January 1, 1973 has been chief counsel in three (3) such matters reaching the United States Supreme Court, two (2) such matters reaching the Missouri Supreme Court and two (2) such matters reaching the United States Eighth Circuit Court of Appeals.

4. He has been extensively involved in abortion rights litigation both locally, *Rodgers, supra, Word, supra, Doe, supra, Wulff, supra, Planned Parenthood of Central Missouri, supra* and nationally, *Roe,* et al v. *Wade,* 410 U.S. 113 (1973), *Doe,* et al. v. *Bolton,* et al., 410 U.S. 179 (1973), etc.

5. The handling of such cases has resulted in critical comment and disapproval by other clients of Affiant and said firm and has had a disparaging business and social effect upon Affiant.

6. Affiant's customary charge for appellate work of this nature is sixty dollars ($60.00) per hour and said firm's customary charge for its associates assisting in work of this nature is forty dollars ($40.00 per hour.

7. Affiant has expended fifty-three and one-quarter

(53.25) hours in the representation of this cause and the associates of said firm have expended fifty-seven (57) hours in the representation of this cause.

8. Based upon Affiant's experience and personal knowledge of abortion circumstances in the State of Missouri, it is his best conservative opinion that seven thousand five hundred women, eligible for state medicaid have undergone abortions since January 22, 1973 and have not to date received any state medicaid payments for same due to the legislation challenged herein.

9. The nature, importance and time elements of this matter required that it receive significant priority over and above the majority of the remainder of Affiant's legal practice.

10. A fair and reasonable attorneys' fee in this cause to date is five thousand four hundred seventy-five dollars ($5,475.00).

(*Jurat Omitted in Printing*)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1484

George J. L. Wulff, Jr., M.D., and Michael Freiman, M.D.,
Appellants,

vs.

Thomas E. Singleton, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare,
Appellee.

Order on Appellants' Motion for Rehearing

Filed: January 9, 1975

Before MATTHES, Senior Circuit Judge, ROSS and STEPHENSON, Circuit Judges.

PER CURIAM

Appellants seek clarification of our holding and further request that we award to appellants a reasonable attorney fee.

It was the Court's intention and we now reiterate our holding that that portion of R.S.Mo. 208.152(12) which states "that such Family Planning Services shall not include abortions unless such abortions are medically indicated" is unconstitutional.

The application for attorney fee is denied.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

(Title Omitted in Printing)

MOTION FOR STAY OF MANDATE

January 20, 1975

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT:

Defendant-Appellee respectfully presents this, his application for, and moves the court to enter, an order staying the issuance of mandate in this case, under the provisions of Section 2101(f), Title 28, United States Code, and pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, because it is the bonafide intention of said appellee to make proper and timely application to the Supreme Court of the United States for writ of certiorari.

The grounds upon which said petition for certiorari will be based are substantially as follows:

1. The decision of the Court of Appeals for the Eighth Circuit, reversing the decision of the United States District Court for the Western District of Missouri, as to the right of appellants-doctors to maintain suit alleging the unconstitutionality of the Missouri state statute restricting Medicaid payments to eligible welfare recipients in particular instances, is in conflict with the decisions of the United States Supreme Court on the matter of standing in ***Flast*** v. ***Cohen,*** 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968);

Association of Data Processing Service Organizations, Inc. v. *Camp,* 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); and *Barlow* v. *Collins,* 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970). The preceeding decisions by the United States Supreme Court have been misconstrued, misapplied, and misconceived in the decision rendered by the Court of Appeals for the Eighth Circuit in the present case.

2. The said decision of said Court of Appeals finding Section 208.152(12) of the Revised Statutes of the State of Missouri unconstitutional on its face denied the defendant-appellee the right to present evidence and legal argument pertaining to the constitutionality of said section because this case appeared before said Court of Appeals in the posture of an appeal from a dismissal of appellants'-doctors' complaint in the United States District Court for the Western District of Missouri on the basis that said parties were without standing to bring suit. Said Court of Appeals, by examining and ruling on the merits of the present case where the court below was given no opportunity so to do nor was the defendant-appellee ever given an opportunity to respond to the merits of the controversy has so departed from the accepted and usual course of judicial proceedings as to call for an exercise of the United States Supreme Court's power of supervision.

3. The said decision of said Court of Appeals as to the right of appellants-doctors to maintain the present suit creates very important issues which ought to be considered and decided upon by the United States Supreme Court because said decision would allow a doctor to bring suit alleging the unconstitutionality of any federal or state wel-

fare statute or regulation solely on the ground of that doctor's uncertainty or apprehension as to the source or amount of payment to be made for his services. The Missouri statute in question in this case has no effect on a doctor's right to practice his chosen profession but only upon his desire to reap the benefits of welfare Medicaid benefits which might be made to prospective patients. The right of a doctor to maintain suit in such instance has not been, but should be, settled by the United States Supreme Court.

4. The said decision of said Court of Appeals in holding unconstitutional on its face the Missouri statute denying Medicaid payments to otherwise eligible welfare recipients for abortions not medically indicated has created an issue of extreme importance to the right of the several states to determine their internal public policy and to administer internal welfare programs, which legal issue has not heretofor been determined by the United States Supreme Court but which should be finally settled by said United States Supreme Court. In such a case where a federal court has intervened into the internal affairs of a sovereign state and has revoked the validly enacted pronouncement of the public policy of said state, said decision should be brought before the United States Supreme Court for final determination.

WHEREFORE, appellee moves the Court for an order staying the issuance of mandate herein pending the filing by said appellee of a petition for certiorari in the Supreme Court and until final disposition therein of the case.

In support hereof, appellee attaches the statement of counsel.

Respectfully submitted,

JOHN C. DANFORTH
Attorney General

MICHAEL L. BOICOURT
Assistant Attorney General

Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321
Attorneys for Appellee

(Certificate of Service Omitted in Printing)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1974

No. 74-1484

George J. L. Wulff, Jr., M.D., and Michael Freiman, M.D.
Appellants,

vs.

The State Board of Registration for the Healing Arts

and

Thomas E. Singleton, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

January 31, 1975

Motion of appellee for stay of mandate in the above case having been considered by the Court, it is now here ordered that said motion be, and is hereby, denied.

SUPREME COURT OF THE UNITED STATES

No. A-780

THOMAS E. SINGLETON, ETC.,
Petitioner

vs.

GEORGE J. L. WULFF, JR., M.D. AND
MICHAEL FREIMAN, M.D.

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 8, 1975.

HARRY A. BLACKMUN
Associate Justice of the Supreme
Court of the United States

Dated this 26th
day of March, 1975.

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, D.C. 20543

June 23, 1975

Michael L. Boicourt, Esq.
Assistant Attorney General of Missouri
Supreme Court Building
P.O. Box 899
Jefferson City, Missouri 65101

RE: *SINGLETON* v. *WULFF, No. 74-1393*

Dear Sir:

The Court today entered the following order in the above case:

"The petition for a writ of certiorari is granted limited to Questions 1 and 2 presented by the petition which read as follows:

"1. Whether there is a logical nexus between the status of respondent-physicians and the claims they seek to have adjudicated sufficient to confer standing on them to challenge the constitutionality of Section 208.152, RSMo Supp. 1973.

"2. Whether the Court of Appeals acted in excess of its jurisdiction when it proceeded to determine on the merits the constitutionality of Section 208.152, RSMo Supp. 1973."

Mr. Justice Douglas took no part in the consideration or decision of this petition."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable.

Very truly yours,

MICHAEL RODAK, JR., CLERK
(Mrs.) Helen K. Loughran
Assistant Clerk

Air mail
Encls.